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No. 340

In the Supreme Court of the United States

OCTOBER TERM, 1929

UNITED STATES OF AMERICA, PETITIONER

v.

NELSON B. UPDIKE ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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PETITION

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above case on March 25, 1929 (rehearing denied May 29, 1929), affirming the decree of the United States District Court for the District of Nebraska.

STATEMENT

The Updike Grain Company, a Nebraska corporation, dissolved and distributed its assets to stockholders without the payment of income and excess-

profits taxes due the United States. Accordingly, the Government instituted this suit in equity, under the trust fund theory, against the former stockholders of that company to recover funds had and received by them for the use and benefit of the United States. The principal defense interposed was that such suit, although one for the recovery of trust funds, was barred by the provisions of the Revenue Act of 1926, limiting the time within which the Government might institute proceedings for the collection of taxes. This defense was upheld by both the United States District Court for the District of Nebraska and the United States Circuit Court of Appeals for the Eighth Circuit.

It is the contention of the petitioner that statutes of limitation relating to proceedings to collect taxes do not apply to a suit in equity under the trust fund doctrine. In the alternative, the petitioner contends that even if such statutes do apply, there is none which bars this suit, for the reason that the required returns were not filed and in the absence of such returns no statute of limitations was set in motion.

The essential facts relative to the above issues are:

The Updike Grain Company was dissolved during the month of August, 1917, and its assets, greatly exceeding its known liabilities, were distributed to its stockholders. (R. 10, 29, 123, 127.) Prior to the passage of the Revenue Act of October 3, 1917, hereinafter referred to as the Revenue Act of

1917, the corporation filed income tax and excess-profits tax returns for the eleven-months period ended June 30, 1917, these returns being prepared under the provisions of the Revenue Acts of September 8, 1916, and March 3, 1917. (R. 163–171.) An amended excess-profits tax return, likewise prepared under the earlier statutes, was filed October 27, 1927. (R. 175.)

On October 3, 1917, the Revenue Act of 1917 was passed, and shortly thereafter the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, issued regulations (Article 61, Regulations 33, and Article 10, Regulations 41) providing that corporations which had dissolved in 1917 prior to the passage of the Act should make income and excess-profits tax returns in accordance with the provisions of the Revenue Act of 1917, for the period preceding dissolution, and that the taxes previously paid for such period would be credited against the amount due.

The former officers of the Updike Grain Company were aware of these requirements, but declined to file returns under the Revenue Act of 1917. (R. 87–95, 148.)

During October, 1918, the Commissioner had a revenue agent investigate the tax liability of the Updike Grain Company, as the result of which investigation additional taxes of $373,911.54 were assessed in January, 1920. (R. 95, 212–213.) In connection with this investigation the revenue agent prepared returns. The evidence is in dispute as to

whether these forms were presented to former officers of the company for verification but not as to the fact that they were never signed or verified by the officers. (R. 96, 115, 121, 349, 350.)

No part of the assessment of $373,911.54 has been paid. No suit or proceeding to collect the amount has been instituted against the dissolved corporation, nor was any suit or proceeding instituted against the stockholders until the present action was begun in 1927.

On April 13, 1928, the District Court entered a decree dismissing the bill at the plaintiff's costs and on May 2, 1928, entered a decree modifying its previous decree only as to costs. (R. 69.)

The trial court held that the revenue agent's report was a return, the filing of which served to set in motion the five-year period of limitations upon the assessment of taxes due under the Revenue Act of 1917; that the assessment made in January, 1920, was made within the statutory period of limitations properly applicable thereto within the meaning of Section 278 (d) of the Revenue Act of 1926; and that under that section this suit against the respondents for the recovery of trust funds was barred because not commenced within six years after the assessment in January, 1920. (R. 65-69.)

Upon appeal the Circuit Court of Appeals sustained the decision of the District Court, holding that the suit was barred by the statute of limitations. Contrary to the District Court, however, the Circuit Court of Appeals conceded that this was a

"no return" case. It based its decision largely on the ground that in enacting Section 278 (d) of the Revenue Act of 1926, Congress intended that the Government's right to collect taxes should be limited to six years from the time of assessment, even where no returns were filed. (R. 396.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

I. In holding that Section 278 (d) of the Revenue Act of 1926, limiting the time within which the petitioner might institute a proceeding to collect income and excess-profits taxes imposed upon the Updike Grain Company by the Revenue Act of 1917, was applicable to and constituted a bar to this suit in equity brought against the respondents as stockholders of the dissolved corporation under the trust fund theory.

II. In holding that, where no returns for the fiscal period ending June 30, 1917, were filed by the corporation as required by the provisions of the Revenue Act of 1917 and the regulations of the Treasury Department, any proceeding of the Commissioner to collect taxes imposed by that Act would be barred within six years from the time the assessment was made by the provisions of Section 278 (d), *supra*.

REASONS FOR GRANTING THE WRIT

I. This case raises a question which has not heretofore been decided by this Court, namely, whether

a provision in a Revenue Act limiting the time within which the United States may begin a proceeding for the collection of taxes, applies to a suit in equity brought by the United States under the trust-fund theory against the stockholders of a dissolved corporate taxpayer, the assets of which had been distributed to such stockholders without the payment of corporation income and excess-profits taxes due the United States. *Russell* v. *United States,* 278 U. S. 181, can not be said to have decided this question, because, while it existed in the record in that case, it was not raised nor considered either in the lower courts or in this Court. *United States* v. *Mitchell,* 271 U. S. 9, 14. The question is one which should be authoritatively decided by this Court. It will arise often because, in view of the attack on the constitutionality of Section 280 of the Revenue Act of 1926, the general jurisdiction of equity has been frequently used against transferees of corporate assets and, however the question of the constitutionality of Section 280 may ultimately be resolved, it will probably continue to be used, since it provides in many cases a more convenient remedy.

II. It is our contention that the above question is controlled in principle by the decision of this Court in *United States* v. *John Barth Co.,* 279 U. S. 370. There this Court held that a statute of limitations applicable to a suit to collect taxes does not apply to a suit to recover on a bond given in connection with a claim in abatement. In that case, as

in this, the liability asserted grew out of a claim for taxes. The only difference between the two cases is that in the *Barth case* the cause of action arose under a contract, whereas here it arises by operation of law. That a liability of the latter sort is not barred by the provisions of a Revenue Act limiting the time for a suit to collect taxes was held in *Talcott* v. *United States*, 23 F. (2d) 897, 901, certiorari denied, 277 U. S. 604, in which the Government's claim was for the amount of taxes refunded to a taxpayer by mistake.

III. Even if it were conceded that a statute limiting the period of collection of taxes is applicable to a suit to enforce an equitable liability, the conclusion of the Circuit Court of Appeals, that the instant suit is barred, is not required by the provisions of Section 278 (d) of the Revenue Act of 1926. The case, therefore, falls within the principle that the United States is not bound by limitations unless Congress has by clear language made it so. The purpose of Congress in enacting Section 278 (d) of the Revenue Act of 1926 was, as indicated by this Court in the *Russell case, supra*, with reference to the corresponding section of the Revenue Act of 1924, to extend rather than to curtail the rights of the Government. Yet the Circuit Court of Appeals in the instant case has construed this section in a manner which bars retroactively a right of the United States which, but for its passage, could have been enforced.

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IV. If an assessment, which the statute provides can be made at any time where no return is filed, as in the instant case, be regarded as it was by the Circuit Court of Appeals as being made within a statutory period of limitations so that the six-year period for collection applies, then the same rule would govern in cases where false and fraudulent returns were filed. In both classes of cases the statute provides the assessment can be made "at any time."

Wherefore, it is respectfully submitted that the petition should be granted.

CHARLES E. HUGHES, JR.,
Solicitor General.

AUGUST, 1929.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. 393) is reported in 32 F. (2d) 1. The opinion of the United States District Court for the District of Nebraska (R. 65–69) is reported in 25 F. (2d) 746.

JURISDICTION

The decree of the Circuit Court of Appeals for the Eighth Circuit was entered on March 25, 1929. (R. 398.) A timely petition for rehearing filed in behalf of the petitioner on May 16, 1929 (R. 399), was denied on May 29, 1929 (R. 400). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Does Section 278 (d) of the Revenue Act of 1926, or any other statutory provision limiting the time within which a proceeding may be brought by the United States for the collection of taxes imposed under the Revenue Act of 1917, have any application to a suit in equity brought under the trust fund theory against the stockholders of a dissolved corporate taxpayer for money had and received to the use and benefit of the United States?

2. Even if it be held that a statute of limitations relating to proceedings to collect taxes imposed by the Revenue Act of 1917 applies to this suit in equity, does Section 278 (d) of the Revenue Act of 1926 constitute a bar to the proceeding, in view of the fact that the required returns were not filed and in the absence of such returns the assessment could be made, in the language of that Revenue Act, "at any time"?

STATUTES AND REGULATIONS INVOLVED

Section 13 (b) of the Revenue Act of 1916, c. 463, 39 Stat. 756, 771, which is incorporated in the Revenue Act of 1917 by Section 1001 (c. 63, 40 Stat. 300, 325) of that Act, provides:

> SEC. 13. (b) Every corporation, * * * subject to the tax herein imposed, shall * * * render a true and accurate return of its annual net income in the manner and form to be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, and containing such facts, data, and information as are appropriate and in the opinion of the commissioner necessary to determine the correctness of the net income returned and to carry out the provisions of this title. The return shall be sworn to by the president, vice president, or other principal officer, and by the treasurer or assistant treasurer. The return shall be made to the collector of the district in which is located the principal office

of the corporation, * * * where are kept its books of account and other data from which the return is prepared, * * *.

Revenue Act of 1921, c. 136, 42 Stat. 227, 265, provides in part as follows:

> SEC. 250. (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 * * * and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts * * * shall be determined and assessed within five years after the return was filed * * *; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts * * * shall be begun, after the expiration of five years after the date when such return was filed, * * *: *Provided further,* That in the case of a false or fraudulent return with intent to evade tax, or of a failure to file a required return, the amount of tax due may be determined, assessed, and collected, and a suit or proceeding for the collection of such amount may be begun, at any time after it becomes due: * * *.

Revenue Act of 1924, c. 234, 43 Stat. 253, 299, provides in part as follows:

> SEC. 277. (a) * * *.
>
> (2) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1917 * * * shall be

assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period. (U. S. C., Title 26, Sec. 1057.)

SEC. 278. (a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time. (U. S. C., Title 26, Sec. 1058.)

Revenue Act of 1926, c. 27, 44 Stat. 9, 58, 59, 61, provides in part as follows:

SEC. 2. (a) When used in this Act—

* * * * *

(9) The term "taxpayer" means any person subject to a tax imposed by this Act.

SEC. 277. (a) Except as provided in section 278—

* * * * *

(3) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1917, * * * shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period. (U. S. C. App., Title 26, Sec. 1057.)

SEC. 278. (a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without

assessment, at any time. (U. S. C. App., Title 26, Sec. 1058.)

* * * * *

(c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon. (U. S. C. App., Title 26, Sec. 1060.)

(d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer. (U. S. C. App., Title 26, Sec. 1061.)

SEC. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and

the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act. (U. S. C. App., Title 26, Sec. 1069.)

Article 61, Treasury Regulations 33, Revised:

ART. 61. *Corporation dissolved prior to October 4, 1917.*—A corporation which was dissolved in 1917, prior to passage of the war-revenue act of October 3, 1917, is subject to tax under the act of September 8, 1916, as amended, and also to the war income tax and the war excess-profits tax imposed by the act of October 3, 1917. (*Brady et al.* v. *Anderson,* 240 Fed. 665.) A corporation so situated will make a return on revised form 1031, covering the period in 1917 during which it was in business prior to its dissolution. If it shall have previously made a return covering this period and shall have paid any excess-profits tax under the act of March 3, 1917, it shall be entitled to credit for the amount of such tax so paid against any excess-profits tax assessable against it under Title II of the act of October 3, 1917.

STATEMENT

A statement of the facts and of the errors relied on will be found in the petition.

ARGUMENT

I

NEITHER SECTION 278 (D) OF THE REVENUE ACT OF 1926 NOR ANY STATUTE PLACING A PERIOD OF LIMITATIONS UPON THE RIGHT OF THE UNITED STATES TO COLLECT TAXES IMPOSED UNDER THE REVENUE ACT OF 1917 IS APPLICABLE TO THIS SUIT IN EQUITY TO RECOVER TRUST FUNDS FROM THE TRANSFEREES OF THE ASSETS OF THE UPDIKE GRAIN COMPANY

It is submitted that the Circuit Court of Appeals erred in holding that Section 278 (d) of the Revenue Act of 1926, a statute of limitations relating to proceedings for the collection of taxes, applied to suits in equity brought to recover trust funds, and in relying upon *Russell* v. *United States,* 278 U. S. 181, as authority to that effect.

The *Russell case, supra,* can not be said to have decided the question whether the statute of limitations relating to the collection of taxes applies to a suit against the transferees of the assets of a dissolved corporation. That question was, it is true, involved in the record in the *Russell case,* but it was not raised or considered either in this Court or in the courts below. In these circumstances this Court can not be said to have authoritatively decided it.

In *United States* v. *Mitchell,* 271 U. S. 9, 14, this Court said:

> It is not to be thought that a question not raised by counsel or discussed in the opinion

> of the court has been decided merely because it existed in the record and might have been raised and considered. *Webster* v. *Fall*, 266 U. S. 507, 511.

See also *Louisville Trust Co.* v. *Knott*, 191 U. S. 225; *New* v. *Oklahoma*, 195 U. S. 252.

Upon the face of the statute it does not appear that Congress intended Section 278 (d) to apply to suits in equity to recover trust funds. That section expressly relates to proceedings to collect *taxes*. This is not such a proceeding. The language of the section refers to the collection of taxes *qua* taxes from the persons on whom the liability therefor is directly imposed by the taxing statutes as distinguished from third persons, such as the respondents here involved, whose liability to the United States is created not by the taxing statutes but by general principles of equity. This is further borne out by an examination of other sections of the statute. Section 277 (a) (3) of the Revenue Act of 1926 provides that (subject to the exception contained in Section 278) the amount of taxes imposed by the Revenue Act of 1917 (the year involved herein) "shall be assessed within five years *after the return was filed*, and no proceeding in court without assessment for the *collection of such taxes* shall be begun after the expiration of such period." (Italics ours.) Section 278 (d) further provides that—

> Where the assessment of any * * * tax imposed by * * * prior Act of Con-

> gress has been made * * * within the statutory period properly applicable thereto, such *tax* may be collected by distraint or by a proceeding in court * * * but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the *taxpayer*. (Italics ours.)

Finally, the term "taxpayer" is defined in Section 2 (a) (9) of the Revenue Act of 1926 as "any person subject to a tax imposed by this," that is, the Revenue Act.

The use of the expression "such tax may be collected" in Section 278 (d), and the reference to the agreement in writing between the "Commissioner and the taxpayer," indicates that such limitation provision should apply only to those persons upon whom the tax liability was imposed by the taxing statutes themselves, that is, the "taxpayer." There can be no *tax* due the United States from any person who is not a taxpayer as defined by Section 2 (a) (9), *supra*.

Moreover, in enacting Section 280 of the Revenue Act of 1926, which prescribes a procedure whereby a notice of deficiency in tax may be sent directly to the transferee of the assets of the taxpayer, and the transferee in such case is given the right of appeal to the United States Board of Tax Appeals, Congress deemed it necessary to make specific provision for the running of the statute of limitations in the case of transferees. If, in the absence of specific

provision, the general statutes of limitation of the Revenue Act of 1926 would not apply to proceedings against transferees under Section 280, it would seem that they would likewise not apply to suits in equity brought, in the language of the Circuit Court of Appeals in the instant case, "under the plenary powers of courts of equity."

That Congress has persisted in regarding the liability of transferees as distinct from the liability of taxpayers is further shown by its enactment of Section 604 of the Revenue Act of 1928 (c. 852, 45 Stat. 791, 873; U. S. C. Sup. III, Title 26, Sec. 2604) prohibiting suits to restrain the enforcement of the liability of transferees under Section 280 of the Revenue Act of 1926 as amended. If a proceeding to enforce such a liability constitutes a proceeding to collect taxes, Section 3224, R. S. (U. S. C., Title 26, Sec. 154), would effectively prohibit a suit to restrain such proceeding, and Section 604 would serve no useful purpose. Cf. *Owensboro Ditcher & Grader Co.* v. *Lucas*, 18 F. (2d) 798; *Felland* v. *Wilkinson* (*unreported*, W. D. Wisc., decided November 22, 1928).

An obligation resting upon a person to pay the United States an amount of money, not because he had a net taxable income and was a taxpayer under the Revenue Acts, but because in some way a different liability, albeit growing out of a tax, has been created with respect to him, is not a tax liability. The liability of the transferees in this case did not come into being by reason of the imposition of the tax against the Updike Grain Company but

by reason of their receiving assets of the corporation (upon its dissolution) prior to the satisfaction of its tax liability. *Updike* v. *United States* (C. C. A. 8th), 8 F. (2d) 913, certiorari denied, 271 U. S. 661; *United States* v. *Armstrong* (C. C. A. 8th), 26 F. (2d) 227.

The term "corporation" does not include stockholders, and a statute imposing a liability upon the corporation does not impose a liability upon the stockholders. *Park Bank* v. *Remsen,* 158 U. S. 337, 346. It is settled that stockholders' liability for corporate indebtedness is a distinct liability which does not come into being until the corporate assets have been transferred to the stockholders. See *Terry* v. *Anderson,* 95 U. S. 628; *Terry* v. *McLure,* 103 U. S. 442; *Scovill* v. *Thayer,* 105 U. S. 143; *McClaine* v. *Rankin,* 197 U. S. 155; *McDonald* v. *Thompson,* 184 U. S. 71; *George* v. *Wallace* (C. C. A. 8th), 135 Fed. 286; *McWilliams* v. *Excelsior Coal Company* (C. C. A. 8th), 298 Fed. 884. The liability to pay taxes in this case, therefore, was a liability against the corporate taxpayer as distinguished from the stockholders. In this situation, if this were a suit to enforce a liability for taxes *qua* taxes owing by the corporation, to assert it against the stockholders would amount to an endeavor to take one person's property to pay another's taxes in violation of the due process clause of the Constitution. Cf. *Frick* v. *Lewellyn,* 298 Fed. 803.

Accordingly, the Government contends that the correct solution of the question presented in the

instant case is to be found in those cases which hold that where two remedies exist, even though one remedy may be barred, the other remedy is unaffected. An example of this doctrine is afforded by the cases holding that a statute limiting the time for a suit to annul land patents has no application to a suit to recover the value of such lands as damages for their fraudulent acquisition. *United States* v. *Whited & Wheless,* 246 U. S. 552. This Court has applied the same principle to an action brought to recover money paid by mistake. *Grand Trunk Western Railway Co.* v. *United States,* 252 U. S. 112. In *Talcott* v. *United States* (C. C. A. 9th), 23 F. (2d) 897, certiorari denied 277 U. S. 604, the Government interposed a counterclaim for the recovery from the plaintiff of a sum which had been refunded by mistake of the Commissioner. The plaintiff contended that the counterclaim was barred by the limitations contained in the Revenue Act of 1926. The court held that "here the counterclaim is not a proceeding for the collection of taxes," and accordingly that it was not barred. This same principle has recently been applied by this Court in *United States* v. *John Barth Co.,* 279 U. S. 370, wherein it was held that a suit brought by the United States upon a bond given to secure the payment of taxes is not barred by the statute of limitations within which a suit must be brought for the collection of taxes.

In analogy to the *Barth case* the Government here contends that its right to sue the stockholders of a

dissolved corporation for money had and received for the use and benefit of the United States is not dependent upon, but exists independently of, and in addition to, any right which the Government might have had to sue the corporate taxpayer for the collection of taxes *qua* taxes, and that consequently the statute of limitations relating to the collection of taxes does not apply to such a suit.

It is true that in the *Barth case, supra,* the independent remedy was founded upon a written contract; whereas in this case it was founded upon an equitable liability, but that fact does not furnish adequate ground for distinguishing the cases. (See *Talcott* v. *United States, supra.*) In both cases a separate and distinct cause of action exists. It is our contention that if the statute of limitations relating to the collection of taxes does not apply in the one case, it should not apply in the other.

II

EVEN THOUGH IT SHOULD BE CONCEDED THAT THE DEFENSE OF A STATUTE OF LIMITATIONS RELATING TO THE COLLECTION OF TAXES WAS AVAILABLE TO THE RESPONDENTS, SUCH DEFENSE MUST FAIL FOR THE REASON THAT THE RETURNS REQUIRED BY LAW HAVE NOT BEEN FILED, WITHOUT WHICH NO STATUTE OF LIMITATIONS HAS BEEN SET IN MOTION

The Circuit Court of Appeals found that this was a case where returns were required to be filed and none were filed, as it had under similar facts in *Updike* v. *United States,* 8 F. (2) 913, certiorari denied, 271 U. S. 661. In the latter case that court held that the required returns not having been filed

by the corporate taxpayer, the assessment of income and excess-profits taxes imposed under the Revenue Act of 1917 could be made "at any time" and a proceeding to collect the tax could be brought "at any time" by virtue of the express provisions of Section 250 (d) of the Revenue Act of 1921. It was held, therefore, that no statute barred the suit against the stockholders.

In the instant case, instead of holding that the Government had an unlimited time within which to institute proceedings to collect, as it had in the first *Updike case,* the Circuit Court of Appeals held that the Government's right to do so expired in January, 1926, six years from the date of the assessment. It distinguished the instant case on the ground that here the proceeding against the stockholders was begun after the passage of the Revenue Act of 1926, Section 278 (d) of which places a limit of six years after assessment upon the Government's right to institute proceedings to collect a tax in all cases where the assessment was made "within the statutory period of limitation properly applicable thereto."

The Circuit Court of Appeals did not find that there was any specific limitation of time within which the Government was required to assess the tax and it could not have reached such a conclusion. The Revenue Acts of 1917 and 1918 do not contain any statute of limitations applicable to assessment of taxes imposed by the Revenue Act of 1917. The

Revenue Acts of 1921, 1924, and 1926 need not be consulted for the purpose of determining whether an assessment made in 1920 was made "within the statutory period of limitation properly applicable thereto" within the meaning of Section 278 (d) of the Revenue Act of 1926. Assuming that they may be, however, the only period of limitation for assessment of taxes imposed under the Revenue Act of 1917 which is recognized by these Acts is a period of five years "after the return was filed" (Section 250 (d), Revenue Act of 1921; Section 277 (a) (2), Revenue Act of 1924; Section 277 (a) (3), Revenue Act of 1926), and where no return has been filed, the assessment may be made at any time (Section 250 (d) of the Revenue Act of 1921; Section 278 (a) of the Revenue Act of 1924; Section 278 (a) of the Revenue Act of 1926).

It is submitted that with respect to a tax which may be assessed at any time, as is the case where the required returns have not been filed, there is no period of limitations applicable, and hence that this case does not come within the provision of Section 278 (d) of the Revenue Act of 1926 limiting the period for collection to six years where an assessment has been made "within the statutory period of limitation properly applicable thereto."

The Circuit Court of Appeals has based its decision largely on the ground that through the insertion of the words "without assessment" after the words "no proceeding in court" in Section 277 (a) of the Revenue Act of 1926, thus amending the

corresponding provision of the Revenue Act of 1924, and by the enactment of Section 278 (d), Congress showed an intention to fix one period (for example, 5 years) for the initial move against the taxpayer, whether by assessment or suit without assessment, and a different period (for example, 6 years) for the second move, namely, for distraint or court proceeding after assessment. But it was plainly the intention of Congress to lengthen and not to shorten the arm of the Government thereby. Compare *Russell* v. *United States, supra.* Instead of construing the Act so as to accomplish this purpose, the Circuit Court of Appeals held in effect that Section 278 (d) of the Revenue Act of 1926 barred absolutely the right of the Government to bring a proceeding to collect an obligation which under statutes existing prior to the time of the passage of that Act could have been collected "at any time." It is established that a statute, particularly a statute of limitations, should not be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions, unless the legislative purpose to do so clearly appears. *United States* v. *Magnolia Co.*, 276 U. S. 160; *Russell* v. *United States, supra.* That rule controls this case.

If it be granted that Section 278 (a) of the Revenue Act of 1926 does not, as did the earlier statutes, specifically provide that where no return has been filed a proceeding to collect the tax *after assessment* may be brought "at any time," the con-

clusion is inescapable that there is no statutory limitation provided as to such actions and hence that they may be brought at any time. In the absence of a statute of limitations which clearly applies, the United States is not bound. *Dupont de Nemours & Co.* v. *Davis,* 264 U. S. 456; *United States* v. *St. Paul, M. & M. Ry. Co.,* 247 U. S. 310.

CONCLUSION

We submit that the decision of the Circuit Court of Appeals was erroneous, and, in view of the general importance of the questions decided, that the petition for writ of certiorari should be granted.

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